United Nations CERD/C/KEN/CO/5-7

International Convention on the Elimination of All Forms of Racial Discrimination

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Committee on the Elimination of Racial Discrimination

# Concluding observations on the fifth to seventh periodic reports of Kenya*

1. The Committee considered the fifth to seventh periodic reports of Kenya (CERD/C/KEN/5-7), submitted in a single document, at its 2530th and 2531st meetings (see CERD/C/SR.2530 and 2531), held on 2 and 3 May 2017. At its 2541st, 2542nd and 2543rd meetings, held on 10 and 11 May 2017, it adopted the present concluding observations.

## A. Introduction

2. The Committee welcomes the submission, albeit delayed, of the fifth to seventh periodic reports of the State party. The Committee expresses appreciation for the constructive dialogue held during the consideration of the report, and also wishes to thank the delegation for the detailed information provided during the consideration of the report and the additional information submitted following the conclusion of the dialogue.

## B. Positive aspects

3. The Committee commends the State party for its engagement in the development of the 2030 Agenda for Sustainable Development and for including in its development blueprint, Vision 2030, strategies aimed at achieving substantive equality through support for historically disadvantaged regions and groups.

4. The Committee welcomes the efforts of the National Cohesion and Integration Commission. It also welcomes the establishment of the Equalization Fund, which benefits marginalized areas.

5. The Committee commends the State party's efforts as a country hosting one of the largest refugee populations in the world.

6. The Committee further welcomes the adoption by the State party of the following legislative measures:

(a) The National Employment Authority Act (2016);

(b) The Legal Aid Act (2016);

(c) The Establishment of the Restorative Justice Fund (2016);

(d) The Basic Education Act (2013);

* Adopted by the Committee at its ninety-second session (24 April-12 May 2017).



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(e) The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (2012).

## C. Concerns and recommendations

### Statistics

7. The Committee welcomes the information provided by the State party concerning the representation of different ethnic groups in civil service employment. Yet the Committee is concerned at the fact that the data provided do not offer a comprehensive appraisal of the enjoyment of rights guaranteed under the Convention, such as the rights to housing, education, employment and health care, disaggregated by ethnic group, including indigenous peoples. The Committee requested these data in its previous concluding observations (art. 1).

8. **The Committee recommends that the State party request the Kenya National Bureau of Statistics to provide statistical data, disaggregated by sex, on the socioeconomic situation and representation in education, employment, health care, housing and public and political life of ethnic groups, including indigenous peoples, in order to provide it with an empirical basis on which to evaluate the equal enjoyment of rights under the Convention.**

### Definition of racial discrimination

9. The Committee notes with great interest that both the State party's Constitution and the National Cohesion and Integration Act 2008 prohibit ethnic discrimination, but observes that the definition of ethnic discrimination contained in the Act is not in line with article 1 of the Convention.

10. **The Committee recommends that the State party amend the definition of ethnic discrimination contained in the National Cohesion and Integration Act to align it with article 1 (1) of the Convention.**

### National human rights institution

11. The Committee welcomes the information that the national human rights institution, the Kenya National Commission on Human Rights, has again been granted "A" status by the Global Alliance of National Human Rights Institutions. The Committee hopes that the Commission will have adequate resources to execute its mandate efficiently (arts. 2 and 6).

12. **Referring to its general recommendation No. 17 (1993) on the establishment of national institutions to facilitate the implementation of the Convention, the Committee recommends that the State party ensure that adequate financial resources are allocated to the Kenya National Commission on Human Rights, in full accordance with article 249 (3) of the Kenyan Constitution and with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).**

### Acts of racial discrimination, racist hate speech and incitement to racial hatred

13. The Committee welcomes the strategies adopted recently to monitor hate speech and incitement to violence in social media platforms and at political rallies. The Committee takes note of the reporting and prosecution of cases of racial discrimination and hate speech, and notes with interest that the State party is reviewing the National Cohesion and Integration Act to strengthen penalties for acts of racial discrimination. However, the Committee is concerned at the lack of comprehensive data collection on reasons for declining to prosecute, convictions, effective remedies for victims and information on administrative procedures and sanctions for acts of racial discrimination, including data by area (employment, education, housing, media, etc.). The Committee is also concerned at information received concerning the need for increased resources for the Director of Public Prosecutions and the National Cohesion and Integration Commission and the need for the Commission to enjoy greater independence. The Committee is further concerned that the

prohibition in the Act does not fully conform to article 4 of the Convention. It notes with interest the State party's ongoing legislative efforts to address this (arts. 2, 4 and 6).

14. **Recalling its general recommendations No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system and No. 35 (2013) on combating racist hate speech, the Committee:**

(a) **Recommends that the State party amend its legislation to align it with article 4 of the Convention;**

(b) **Encourages the State party to continue to prosecute acts of racial discrimination and racist hate speech and to increase the powers of the Director of Public Prosecutions in the initiation of proceedings and the responsibilities of the National Cohesion and Integration Commission, at the same time enhancing its independence;**

(c) **Reiterates its request for information on complaints, prosecutions, convictions, administrative procedures initiated, by area (employment, education, media, housing, hate speech, etc.), and sanctions imposed for acts of racial discrimination (see CERD/C/KEN/CO/1-4, paras. 9-10), and requests information on compensatory measures available to victims adopted by the authorities as a result of such convictions or sanctions;**

(d) **Requests an explanation of the different administrative bodies with the authority to address acts of racial discrimination (by area, including hate speech, housing, education, media and employment).**

**Access to justice**

15. The Committee welcomes the adoption of the Legal Aid Act (2016) and the National Legal Aid Policy, intended to ensure access to affordable legal aid and awareness services for all Kenyans. However, the Committee is concerned that the combined budget of the Legal Aid Fund and the National Legal Aid Awareness Fund may be insufficient. It is also concerned at reports that the Act has not been fully implemented and that court proceedings continue to be excessively complex and expensive for many victims of racial discrimination, including indigenous peoples and women (arts. 5 and 6).

16. **The Committee encourages the State party to continue implementing its legal aid policies to ensure equal access to justice for victims of racial discrimination, minorities and indigenous peoples, in particular by:**

(a) **Providing adequate funding and staffing for legal aid services;**

(b) **Reducing the distances between national courts and the areas where some minority groups and indigenous peoples live, including by building the human rights-related capacity of alternative justice systems and continuing to establish and operationalize small claims courts to deal with minor disputes.**

**Special measures to address inequalities**

17. The Committee welcomes the various provisions in domestic law and programmes establishing special measures to remedy inequality between different groups and counties. A key component of these efforts has been the steps taken to devolve certain powers to county governments and the operation of the Equalization Fund to provide marginalized regions with special funds to generate development and reduce inequalities. However, the Committee notes that while county boundaries may in some cases tend to reflect ethnic divisions, over a dozen counties are not in compliance with the provision of the County Governments Act that requires that at least 30 per cent of vacant entry-level posts must be filled by candidates belonging to the county's ethnic minorities (art. 5).

18. **In accordance with articles 1 (4) and 2 (2) of the Convention and with its general recommendation No. 32 (2009) on the meaning and scope of special measures in all areas of the Convention, the Committee recommends that the State party strengthen its efforts to ensure that counties implement the minority recruitment requirements of the County Governments Act, including by considering the possibility**

**of imposing sanctions on non-compliant counties. The Committee also requests that the State party encourage private corporations and businesses in the country to facilitate greater equality in employment across ethnic groups.**

**Situation of indigenous peoples**

19. The Committee is alarmed by reports that the Sengwer people are being forcibly evicted from their traditional forest lands in the Embobut Forest, in violation of a High Court injunction. While noting the State party's position that no forced evictions have recently been carried out, the Committee notes allegations that agents of the Kenya Forest Service have burned dozens of Sengwer homes. Similarly, the Committee is worried about reports that the Endorois indigenous community has been subjected to attacks and forced evictions by armed raiders. The Committee is further concerned at reports that in spite of the 2014 High Court decision in *Joseph Letuya and others v. The Attorney General*, the forced eviction of the Ogiek people from the Mau Forest continues today. The Committee is also concerned at reports that activities affecting the ancestral land occupied by indigenous peoples have been undertaken without their free, prior and informed consent (arts. 2, 5 and 6).

20. **In line with its general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee urgently calls upon the State party to:**

(a) **Prevent, investigate, prosecute and sanction acts threatening the physical security and property of the Sengwer, the Endorois, the Ogiek and other indigenous peoples;**

(b) **Ensure legal acknowledgement of the collective rights of the Sengwer, the Endorois, the Ogiek and other indigenous peoples to own, develop, control and use their lands, resources and communal territories according to customary laws and traditional land-tenure systems and to participate in the exploitation, management and conservation of the associated natural resources;**

(c) **Carry out effective consultations between relevant actors and communities likely to be affected by projects to develop, conserve or exploit indigenous ancestral land or its natural resources and obtain the free, prior and informed consent of indigenous communities before implementing such projects.**

21. While welcoming the State party's recent measures to enhance access to education, the Committee is concerned at reports that indigenous peoples have difficulty accessing education due to the lack of nearby schools (arts. 5 (e) and 7).

22. **The Committee recommends that the State party strengthen its efforts to ensure that all Kenyans enjoy access to education without discrimination, including through the adoption of appropriate special measures.**

**Historical land injustices**

23. The Committee commends the provision in article 40 of the 2010 Constitution that affirms the right of individuals and groups to own property either individually or collectively. The Committee also notes the adoption of the Community Land Act 2016 and of the Land Laws Amendment Act 2016, which addresses historical land injustices. The Committee welcomes the establishment in 2016 of the Restorative Justice Fund, which aims to give relief to victims of historical injustices. However, the Committee is concerned that inter-ethnic conflicts continue to be fuelled by inequities arising from the present landownership pattern (art. 5 (d) and (e)).

24. **Given the fact that the discriminatory pattern of land distribution is a core grievance fuelling ethnic disputes, the Committee urges the State party to take the requisite measures towards redistribution of land. The Committee reiterates its recommendation that the State party take measures without delay to operationalize the mechanisms for addressing land problems fairly, taking into account the historical contexts of landownership and acquisition (see CERD/C/KEN/CO/1-4, para. 18). The Committee invites the State party to provide data about patterns of landownership. The Committee also wishes to have more information about the constitutional**

**requirements to set a maximum limit on the amount of land that can be owned or leased by an individual or group. The Committee urges the State party to take every opportunity, through urban planning programmes, to create communities in which residents live, work, go to school and exercise political participation in multi-ethnic settings.**

**Informal settlements**

25. The Committee remains concerned about the informal settlements and what appears to be slow movement by the Government, despite the Kenya Slum Upgrading Programme, to provide residents with adequate housing, clean water and sanitation, health-care services and accessible education for young people. The Committee has emphasized in its previous concluding observations that this was a matter of urgency and that steps must be taken to invest in efforts commensurate with the scale of the problems to avoid further ethnic conflicts in the slums (art. 5).

26. **Given that the informal settlements are still a source of continuing resentment and potential ethnic tension, the Committee would like to be informed about the measures the State party has devised to address the magnitude of the problem, calls upon the State party to expedite the Kenya Slum Upgrading Programme and encourages it to promote a mix of ethnic groups in housing.**

**Stateless persons**

27. The Committee notes with interest the efforts made by the State party to register stateless individuals. However, the Committee is concerned at reports that some ethnic groups, including the Nubians, individuals of Somali descent and groups living near the country's borders, face challenges and lengthy vetting procedures in obtaining identity documents (arts. 1, 2 and 5).

28. **In accordance with its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee urges the State party to stop discriminatory practices and accelerate its efforts to address statelessness, including through standardized registration procedures and issuance of official identification documents. The Committee also urges the State party to consider awarding Kenyan citizenship to all Nubians who were residing in Kenya on the date of Kenyan independence and their descendants.**

**Counter-terrorism measures**

29. While noting the recent terrorist attacks that have resulted in increased security measures in Kenya, the Committee is concerned at reports that counter-terrorism initiatives to combat Al-Shabab, including ethnic profiling of certain ethnic groups, have resulted in human rights violations, including dozens of extrajudicial killings and enforced disappearances (art. 5).

30. **The Committee recommends that the State party promptly address the alleged violations and ensure that all suspected persons benefit from fundamental legal safeguards, particularly when the suspects are of foreign descent or nationality, in the light of the statement on racial discrimination and measures to combat terrorism adopted by the Committee on 8 March 2002 (see A/57/18, para. 514).**

**Trafficking in persons and migrant workers overseas**

31. The Committee is concerned at the State party's information regarding the recruitment of Kenyans, especially women, to perform domestic work abroad in conditions akin to slavery. The Committee is concerned that in 2013, the State party identified several dozen victims of trafficking but convicted only seven perpetrators of trafficking offences (arts. 5 and 6).

32. **The Committee recommends that the State party accelerate its efforts to combat trafficking in persons and provide in its next periodic report data on human trafficking, including information on court cases and remedies provided to victims. It**

**also encourages the State party to pursue its efforts to combat abuse of Kenyan migrant workers abroad and to ratify the Domestic Workers Convention, 2011 (No. 189) of the International Labour Organization (ILO).**

**Persons with albinism**

33. While noting the information provided by the State party during the dialogue concerning efforts to address violence against persons with albinism in Kenya, the Committee is alarmed by reports that there have been 13 such attacks, including 5 killings (arts. 6 and 7).

34. **The Committee recommends that the State party take effective measures to protect persons with albinism from violence, discrimination and stigmatization.**

**Truth, Justice and Reconciliation Commission**

35. Notwithstanding the information provided by the State party, the Committee is concerned at reports that some victims of the violence that followed the 2007 elections have not received sufficient relief and have not been able to return safely to their land owing to security concerns (arts. 6 and 7).

36. **The Committee requests the State party to provide further details and assurances concerning the recommendations made by the Truth, Justice and Reconciliation Commission and remedies provided to those affected by the 2007 post-election violence (see CERD/C/KEN/CO/1-4, paras. 14-16).**

**Refugees and asylum seekers**

37. The Committee commends the State party for having received and hosted hundreds of thousands of refugees and asylum seekers for over 25 years, in coordination with international humanitarian agencies. However, the Committee is seriously concerned at the Government's decision to appeal the 2017 High Court ruling that the order to close the Dadaab camp, which hosts over 250,000 refugees, was null and void. The Committee is concerned at the absence of information concerning burden sharing by the international community, as the Committee recommended in its previous concluding observations (see CERD/C/KEN/CO/1-4, para. 25). The Committee is also concerned about restrictions on the freedom of movement of refugees, the absence of alternative resettlement options and substandard conditions for those living in the camps (arts. 2, 5 and 6).

38. **The Committee recommends that the State party ensure the protection of asylum seekers and refugees in its territory, in accordance with its legal obligations, in particular by:**

(a) **Continuing to partner with international humanitarian agencies to establish and maintain sufficient capacity for refugees and asylum seekers in reception facilities by providing adequate food, shelter and health services;**

(b) **Inviting once again the international community to discharge its responsibility towards refugees under the principle of burden sharing;**

(c) **Developing, in consultation with the groups concerned and in partnership with the Office of the United Nations High Commissioner for Refugees and other relevant organizations, a long-term strategy for the durable solution of local integration of the refugees, especially with regard to education and access to decent livelihoods, as residence in camps does not represent a durable solution for their inhabitants;**

(d) **Respect the 2013 High Court decision in *Kituo Cha Seria and others v. The Attorney General* and follow the law when declaring curfews, ensuring that they are not maintained for a disproportionate length of time and are resorted to only in exceptional circumstances.**

## D. Other recommendations

**Ratification of other instruments**

39. **Bearing in mind the indivisibility of all human rights, the Committee encourages the State party to consider ratifying those international human rights instruments that it has not yet ratified, in particular treaties with provisions that have direct relevance to communities that may be subjected to racial discrimination, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Committee also recommends that the State party ratify the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).**

**Follow-up to the Durban Declaration and Programme of Action**

40. **In the light of its general recommendation No. 33 (2009) on follow-up to the Durban Review Conference, the Committee recommends that, when implementing the Convention in its domestic legal order, the State party give effect to the Durban Declaration and Programme of Action, adopted in September 2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, taking into account the outcome document of the Durban Review Conference, held in Geneva in April 2009. The Committee requests that the State party include in its next periodic report specific information on action plans and other measures taken to implement the Durban Declaration and Programme of Action at the national level.**

**International Decade for People of African Descent**

41. **In the light of General Assembly resolution 68/237, in which the Assembly proclaimed 2015-2024 the International Decade for People of African Descent, and resolution 69/16 on the programme of activities for the implementation of the International Decade, the Committee recommends that the State party prepare and implement a suitable programme of measures and policies. The Committee requests that the State party include in its next periodic report specific information on the concrete measures adopted in that framework, taking into account its general recommendation No. 34 (2011) on racial discrimination against people of African descent.**

**Consultations with civil society**

42. **The Committee recommends that the State party continue consulting and increasing its dialogue with civil society organizations working in the area of human rights protection, in particular those working to combat racial discrimination, in connection with the preparation of the next periodic report and in follow-up to the present concluding observations.**

**Amendment to article 8 of the Convention**

43. **The Committee recommends that the State party ratify the amendment to article 8 (6) of the Convention adopted on 15 January 1992 at the fourteenth meeting of States parties to the Convention and endorsed by the General Assembly in its resolution 47/111.**

**Declaration under article 14 of the Convention**

44. **The Committee encourages the State party to make the optional declaration provided for in article 14 of the Convention recognizing the Committee's competence to receive and consider individual communications.**

**Common core document**

45. **The Committee encourages the State party to submit to it a common core document to replace its core document (HRI/CORE/KEN/2011), issued in 2011, in**

**accordance with the harmonized guidelines on reporting under the international human rights treaties, in particular those on the common core document, as adopted at the fifth inter-committee meeting of the human rights treaty bodies, held in June 2006 (HRI/GEN/2/Rev.6, chap. I). In the light of General Assembly resolution 68/268, the Committee urges the State party to observe the limit of 42,400 words for such documents.**

**Follow-up to the present concluding observations**

46. **In accordance with article 9 (1) of the Convention and rule 65 of its rules of procedure, the Committee requests the State party to provide, within one year of the adoption of the present concluding observations, information on its implementation of the recommendations contained in paragraphs 8 and 14 (c) and (d) above.**

**Paragraphs of particular importance**

47. **The Committee wishes to draw the attention of the State party to the particular importance of the recommendations contained in paragraphs 20, 24, 26 and 38 above and requests the State party to provide detailed information in its next periodic report on the concrete measures taken to implement those recommendations.**

**Dissemination of information**

48. **The Committee recommends that the State party's reports be made readily available and accessible to the public at the time of their submission and that the concluding observations of the Committee with respect to those reports be similarly publicized in the official and other commonly used languages, as appropriate.**

**Preparation of the next periodic report**

49. **The Committee recommends that the State party submit its combined eighth to ninth periodic reports, as a single document, by 13 October 2020, taking into account the reporting guidelines adopted by the Committee during its seventy-first session (CERD/C/2007/1) and addressing all the points raised in the present concluding observations. In the light of General Assembly resolution 68/268, the Committee urges the State party to observe the limit of 21,200 words for periodic reports.**